DEPUTY COMMISSIONER OF TAXATION

v.

STATE BANK OF NEW SOUTH WALES

HIGH COURT, AUSTRALIA
MASON CJ
BRENNAN J
DEANE J
DAWSON J
TOOHEY J
GAUDRON J
MCHUGH J
[F.C. 92/005]
25 FEBRUARY 1992

REVENUE LAW: *Printed matter manufactured in Australia by defendant - Whether sales tax payable in respect of the printed matter applied by defendant for its own use - Whether defendant can be termed "state" - Is it property belonging to the state - If so, whether the tax law is in contravention of the constitution.*

The plaintiff sued to recover from the defendant the sum of $23,636.94 alleged to be due and payable under two assessments for sales tax. The sales tax was payable by the defendant in respect of printed matter manufactured in Australia by the defendant and applied to its own use.

The defendant in its defence asserts (a) that it is the State Bank of New South Wales, and (b) that if, and in so far as, the tax imposed by the Sales Tax Act is capable of having application is respect of the printed matter or any of it, that Act is a law imposing tax on property belonging to a State in contravention of s. 114 of the Constitution and is invalid.

The plaintiff demurred the defence on the grounds (a) the State Bank is not "a State" for the purpose of s. 114 and (b) the sales tax is not a tax on property and hence does not contravene s. 114.

Held:

[1] Viewed in its entirety, s. 17(1) imposes a sales tax on three ways in which an owner exercises rights of ownership with respect to property. Once it is appreciated that liability to pay the tax is attracted either by an owner's sale or by use of his or her property, the conclusion becomes inevitable that the tax is relevantly a tax on property.

[2] There is no reason for drawing a distinction between the reference to "a State" in s. 75(iv) and similar references elsewhere in the Constitution where the reference is to a State as a polity and not as geographical area. A corporation exercising governmental functions is "a State" for the purposes of s. 114. The State was carrying on banking through its statutory corporation, the State Bank. It necessarily follows that the bank is for this purpose the State of New South Wales.

[Demurrer overruled. Order that judgment in the action be entered for the defendant and the plaintiff pay the defendant's costs of the demurrer and of the action.]

Cases referred to:

Max Factor & Co. Inc. v. Federal Commissioner of Taxation [1971] 124 CLR 353 ***(cit)***
Parton v. Milk Board (Vict.) [1949] 80 CLR 229 ***(cit)***
Dennis Hotels Pty. Ltd v. Victoria [1960] 104 CLR 529 ***(cit)***

Anderson's Pty Ltd. v. Victoria [1964] 111 CLR 353 ***(cit)***
Western Australia v. Hamersley Iron Pty. Ltd. (No. 1) [1969] 120 CLR ***(cit)***
Queensland v. The Commonwealth (The First Fringe Benefits Tax Case) [1987] 162 CLR 74 ***(foll)***
Attorney-General of NSW v. Collector of Customs for NSW ("the Steel Rails Case") [1908] 5 CLR 818 ***(cit)***
The State of South Australia v. The Commonwealth [1992] 4 CLJ (Rep) 161 ***(cit)***
The Municipal Council of Sydney v. The Commonwealth [1904] 1 CLR 208 ***(cit)***
Essendon Corpn. v. Criterion Theatres Ltd. [1947] 74 CLR 1 ***(cit)***
Attorney-General (Vict) Ex rel. Black & The Commonwealth [1981] 146 CLR 559 ***(cit)***
Bank of NSW v. The Commonwealth [1948] 76 CLR 1 ***(cit)***
Crouch v. Commissioner for Railways (Q) [1985] 159 CLR 22 ***(cit)***
Superannuation Fund Investment Trust v. Commissioner of Stamps [1979] 145 CLR 330 ***(cit)***
Townsville Hospitals Board v. Townsville City Council [1982] 149 CLR 282 ***(cit)***
State Bank of NSW v. Commonwealth Savings Bank of Australia [1986] 161 CLR 639 ***(cit)***
The Federated Amalgamated Government Railway and Tramway Service Association v. The New South Wales Railway Traffic Employees Association ("the Railway Servants Case") [1906] 4 CLR 488 ***(cit)***
Melbourne Corpn. v. The Commonwealth [1947] 74 CLR 31 ***(cit)***
Heiner v. Scott [1914] 19 CLR 381 ***(cit)***
McCulloch v. Maryland [1819] 17 US 316 ***(cit)***
Inglis v. Commonwealth Trading Bank of Australia [1969] 119 CLR 334 ***(cit)***
Maguire v. Simpson [1977] 139 CLR 362 ***(cit)***

Legislation referred to:
Constitution of Australia [Aust], ss. 75(iii), (iv), 98, 102, 114
Judiciary Act 1903 [Aust], ss. 38(d), 64
Sales Tax Assessment Act 1930 [Aust], ss. 3(1), 17(1), 25(2A)

Other source referred to:
Law and Government in Colonial Australia (1987), Finn

For the plaintiff - Australian Government Solicitor
For the defendant- Paul William Kearns
For the interveners - B.M. Selway & K.M. O'Shea; Crown Solicitors for the States of South Australia & Queensland respectively

JUDGMENT

In an action in this Court the plaintiff, the Deputy Commissioner of Taxation , sues to recover from the defendant, the State Bank of New South Wales ("the State Bank"), the sum of $23,636.94 alleged to be due and payable under two assessments for sales tax made on or about 18 July 1983 and 4 November 1983 respectively, together with additional tax. The plaintiff claims that each assessment was made under s. 25(2A) of the Sales Tax Assessment Act (No. 1) 1930 (Cth) ("the Assessment Act") and relates to sales tax said to be payable by the State Bank in respect of printed matter manufactured in Australia by the State Bank and applied to its own use. The first assessment relates to the period from 1 May 1983 to 31 May 1983 the second to period from 1 June 1983 to 31 August 1983.

The State Bank has filed a defence to the plaintiff's statement of claim. By para. 10 of the defence the State Bank asserts (a) that it is the State Bank of New South Wales, and (b) that if, and in so far as, the tax imposed by the *Sales Tax Act (No. 1)* 1930 (Cth) is capable of having application in respect of the printed matter or any of it, that Act is a law imposing tax on property belonging to a State in contravention of s. 114 of the Constitution and is

invalid. The plaintiff has demurred to para. 10 of the defence on the grounds that (1) the State Bank is not "a State" for the purposes of s. 114, and (2) the sales tax is not a tax on property and hence does not contravene s. 114.

The parties have agreed upon a statement of facts which may be shortly stated. The State Bank is, and all material times was, the State Bank of New South Wales for the purposes of s. 38(d) of the Judiciary Act 1903 (Cth). However, as will appear, the plaintiff contends that the State Bank is not the State Bank of New South Wales for the purposes of s. 114 of the Constitution. The State Bank is constituted a corporation pursuant to the State Bank Act 1981 (NSW). It carries on the business of banking in New South Wales and elsewhere. For use in its banking business the State Bank has, for approximately thirty-five years and at all material times, printed various documents, forms and material required for the purposes of its business ("the printed matter"). The printed matter was, after coming into existence, used at all times by the State Bank in the course of and for the purpose of its business and remained its property. At no time during the relevant periods was any of the printed matter sold to any person, nor did title to it pass to anyone except in so far as some of the printed matter was supplied to the State Building Society Limited and some State Government instrumentalities. The assessments were made on the basis that the printed matter was "goods", that the printing of the matter by the State Bank constituted "manufacture" and that the "goods" so "manufactured" were applied by the State Bank to its own use within the meaning and for the purposes of s. 17 of the Assessment Act.

Section 17(1) of the Assessment Act provides:

> Subject to, and in accordance with, the provisions of this Act, the sales tax imposed by the Sales Tax Act (No. 1) 1930 shall be levied and paid upon the sale value of goods manufactured in Australia by a taxpayer and sold by him or treated by him as stock for sale by retail or applied to his own use.

Section 3 of the Sales Tax Act (No. 1) imposes sales tax upon "... the sale value of goods manufactured in Australia by a taxpayer and ... sold by the taxpayer or treated by the taxpayer as stock for sale by retail or applied to the taxpayer's own use ..."

"Manufacturer" is defined by s. 3(1) of the Assessment Act to mean, unless the contrary intention appears:

> ... a person who engages, whether exclusively or not, in the manufacture of goods, and includes a printer ...

Under s. 17(1), a manufacturer's application to his or her own use of goods manufactured in Australia is one of three ways in which goods manufactured in Australia attract liability to sales tax on the part of the taxpayer, the other ways being a manufacturer's sale of the goods or treatment of the goods as stock for sale by retail. In the context of s. 17(1), the expression "applied to his own use" is one of broad import and is equivalent in meaning to "employed for his own purposes" *(Max Factor & Co. Inc. v. Federal Commissioner of Taxation* [1971] 124 CLR 353, per Gibbs J at p. 362). Although the tax is not expressly imposed upon property or by reference to the manufacturer's ownership of, or property in, the goods, sales tax has generally been regarded as an excise, that is to say, it is a tax upon goods, the fundamental concern being with the commodity on which the tax is imposed rather than with the particular person from whom it is exacted (See *Parton v. Milk Board (Vict.)* [1949] 80 CLR 229, per Dixon J at p. 259; *Dennis Hotels Pty. Ltd. v. Victoria* [1960] 104 CLR 529, per Kitto J at pp. 562-563; Taylor J at pp. 571-572; *Anderson's Pty. Ltd. v. Victoria* [1964] 111 CLR 353, per Kitto J at pp. 373-374; *Western Australia v. Hamersley Iron Pty. Ltd.* (No. 1) [1969] 120 CLR

42, per Barwick CJ at pp. 55-56; Windeyer J at p. 69; Owen J. at p. 71). That view of sales tax has been based no doubt on a consideration of the central element in sales tax legislation - The imposition of the tax in respect of some dealing with goods by way of sale or distribution in the expectation, or with the intention, that the taxpayer will not bear the incidence of the tax but will indemnify himself or herself by passing it on to a purchaser or consumer. This characteristic of the tax enables one to say of it that its fundamental concern is with the goods rather than with the person from whom it is exacted.

In a case such as the present, where the tax is imposed not in respect of sale or distribution but in respect of the application by a manufacturer of the goods to its own use, different considerations arise. In this class of case it is not expected that the liability for payment of sales tax imposed upon manufacturer will be passed on to a purchaser or consumer. On the contrary, it is intended that the manufacturer will satisfy the liability without indemnifying itself. However, the tax imposed is not the less a tax upon the goods on this score. The imposition of the tax in this situation merely ensures that the tax is more comprehensive in its application to goods manufactured in Australia and extends to goods which, though they are not sold by the manufacturer, are used by the manufacturer. Of necessity in this situation the manufacturer itself, which is also the end user, must bear the burden of the liability to tax.

To conclude that the imposition of sales tax under s. 17(1) upon a manufacturer's application of goods manufactured in Australia to its own use is a tax upon the goods in the sense described above may provide some support for the view that the sales tax is a tax upon property within the meaning of s. 114 of the Constitution. But the conclusion cannot be decisive of that question. It is necessary to examine rather more precisely the relationship between the imposition of the tax in the present case and the property in the goods in which it relates.

It may be that in some circumstances liability to sales tax on the part of manufacturers will arise when they apply to their own use manufactured in Australia which they do not own. It is unnecessary now to determine that question. However, ordinarily one would expect that a manufacturer which applies to its own use goods manufactured in Australia is the owner of those goods. That appears to be the primary focus of the relevant part of s. 17(1). It looks to a situation in which the manufacturer, being the owner of the goods by reason of having brought them into existence, applies them to its own use. Certainly liability to the tax will arise whenever a manufacturer of goods owns them and applies them to its own use. In that situation the tax is imposed by reference to a use made by an owner of its goods. It is the owner's use for its purposes of goods in which it has title or property which attracts the liability to tax.

The prohibition in s. 114 of the Constitution against the imposition of "any tax on property of any kind belonging to a State" protects the property of a State from a tax on the ownership or holding of property. But it does not protect the State from a tax on transactions which affect its property, unless the tax can be truly characterized as a tax on the ownership or holding of property (*Queensland v. The Commonwealth* (*The First Fringe Benefits Tax Case*) [1987] 162 CLR 74, per Mason, Brennan and Deane JJ at pp. 96-98, esp. at p. 98; see also *Attorney-General of N.S.W. v. Collector of Customs for N.S.W.* (*"the Steel Rails Case"*) [1908] 5 CLR 818). In the context of a constitutional immunity from taxation on property, it is not possible to make a rigid dichotomy between a tax on property and a tax on transactions. A tax framed as a tax on transactions may in some circumstances amount to a tax on property.

Such a tax, though it may take the form of a tax on transactions, may yet be in truth and substance a tax on property. If it were otherwise, the constitutional immunity would be little more than an empty shell, easily circumvented by framing the tax as a tax on transactions, though upon analysis the tax is tantamount to a tax upon the ownership or holding of property.

What we have just said lies at the very core of the reasoning in *The First Fringe Benefits Tax Case* ([1987] 162 CLR, per Gibbs CJ at p. 92; Mason, Brennan and Deane JJ at p. 98; Wilson J at p. 101; Dawson J at p. 105). Indeed, in all but one of the judgements in that case, a tax on the use of State property or the tax on the use of property for State purposes was instanced as an illustration of a tax which fell within the prohibition contained in s. 114. The other judgment, that of Dawson J, did not exclude such a tax from the operation of the section. On the contrary, his Honour's requirement that there be a sufficiently direct relationship between the tax and the property itself before the tax can be characterized as a tax on property (*ibid*., at p. 105) would be satisfied by the relationship between a tax on the use of property by its owner and the ownership or holding of the property. So, a tax on the use of the property, s. 114. On the other hand, a imposed upon the use or occupation of land by the owner would be "taxon property" for the puroses of the section without more, would not be properly characterized as a "tax on property" for the purposes of the section for the reason that it is tantamount to a tax upon the ownership or holding of the relevant property. The Court has accepted and applied that distinction in *The State of South Australia v. The Commonwealth* (Judgment delivered immediately before the judgment in this case, 25 February 1992).

In passing, we should acknowledge that there was a difference in the approach taken to the interpretation of the section by Gibbs CJ in *The First Fringe Benefits Tax Case* on the one hand and by the rest of the Court on the other hand. Gibbs CJ considered that a tax on property for the purposes of s. 114 is not confined to a tax on the ownership or holding of property and that the immunity extends to a tax on the use of State property. The other members of the Court considered that the constitutional immunity attaches to ownership or holding of property by a State but that this immunity will be infringed by a tax on the use by a State of its property. This difference may be put to one side, for the difference routes traversed in *The First Fringe Benefits Tax Case* ([1987] 162 CLR, at pp. 93, 98-99, 100, 108) led to the one destination which is relevant for present purposes, namely, that in the circumstances of that case a tax on the use by a State of its property was a tax on property for the purposes of s. 114.

The proposition that a tax on the use of property may, in appropriate circumstances, be tantamount to a tax on property for the purposes of the section finds support in *The Muncipal Council of Sydney v. The Commonwealth* ([1904] 1 CLR 208, per Griffith CJ at pp. 231-232) where rates levied by a local authority on property owned and occupied by the Commonwealth were held to be a tax imposed by a State on property of the Commonwealth within the meaning of s. 114, the tax being in substance a "tax on property" (See also *Essendon Corpn. v. Criterion Theatres Ltd.* [1947] 74 CLR 1, per Latham CJ at p. 13).

The plaintiff submits that the tax imposed by s. 17(1) is not imposed on the use of property as such but is imposed on application to use. According to the argument, the distinction is important because application to use is transitory or momentary activity or event which stands in high contrast with ownership or use of property over a long period. The short answer to this submission is that a tax on application to use of property is not the less a tax on the use of property because it attaches to a momentary activity rather than to use or ownership

over a period. The tax attaches to use, that being the exercise of a right central to the concept of ownership, and that is enough to bring the tax within the ambit of the constitutional prohibition.

The Solicitor-General for New South Wales makes the further point, with which we agree, that it is legitimate to look at the entirety of s. 17(1) in determining whether it imposes a tax on property. Viewed in its entirety, the subsection imposes a sales tax on three ways in which an owner exercises rights of ownership with respect to property. Once it is appreciated that liability to pay the tax is attracted either by an owner's sale or by use of his or her property, the conclusion becomes inevitable that the tax is relevantly a tax on property.

We now turn to the question whether tax is imposed on property belonging to the State. The plaintiff argues in favour of a restricted meaning of "State" for the purposes of s. 114, contending that a constitutional prohibition should be construed strictly rather than broadly (See *Attorney-General (Vict.); Ex rel. Black v. The Commonwealth ("the DOGS Case";* [1981] 146 CLR 559, per Mason J (with whom Aickin J agreed) at pp. 614-615; Wilson J at pp. 652-653; but cf. per Barwick CJ at p. 577). In particular, the plaintiff argues that neither the denotation nor connotation of a constitutional prohibition should be permitted to change from time to time. This argument may have some strength in the context of a prohibition which is clearly directed against an identifiable mischief. But in this respect to give a strict construction to s. 114 would be more likely to frustrate than to achieve the attainment of its object, namely, the protection of the property of the Commonwealth and the States from the imposition of their respective financial integrity.

In any event, there is no room here for the principle of construction for which the plaintiff contends. The question is whether the State Bank is a State for the purposes of the section, and there can be no doubt that s. 114 refers to the polity which is a State within the Australian federation. The constitutional conception of "a State" was explained by Dixon J in this way (*Bank N.S.W. v. The Commonwealth* [1948] 76 CLR 1, at p. 363, cited with evident approval in *Crouch v. Commissioner for Railways (Q.)* [1985] 159 CLR 22, per Gibbs CJ at pp. 28-29)

> The Constitution sweeps aside the difficulties which might be thought to arise in a federation from the traditional distinction between, on the one hand the position of the Sovereign as the representative of the State in a monarchy, and the other hand the State as a legal person in other forms of government ... and goes directly to the conceptions of ordinary life. From the beginning to end [the Constitution] treats the Commonwealth and the States as organizations or institutions of government possessing distinct individualities. Formally they may not be juristic persons, but they are conceived as politically organized bodies having mutual legal relations and amenable to the jurisdiction of Courts upon which the responsibility of enforcing the Constitution rests.

Although his Honour made these comments in the context of elucidating s. 75(iii) and (iv) of the Constitution, they apply with equal force to s. 114.

That exposition of the constitutional conception of "a State" is inconsistent with the plaintiff's submission that, in order to establish that the printed matter is property of the State, the State Bank must show that it is the Crown "in right of" the State, to adopt the words of Stephen J in *Superannuation Fund Investment Trust v. Commissioner of Stamps (S.A.)* ([1979] 145 CLR 330, at p. 339). Stephen J's remarks do not support the plaintiff's submission because his Honour was not enunciating a proposition of the kind proposed by the plaintiff; he was merely recounting a step in an argument which fell for consideration.

The plaintiff submits, alternatively, that the question is to be determined by asking whether the State Bank is entitled to "the privileges and immunities of the Crown" in accordance with the approach adopted in *Townsville Hospitals Board v. Townsville City Council* ([1982] 149 CLR 282, per Gibbs CJ at p. 288). Again, this submission has little to commend it. The "shield of the Crown" doctrine has evolved as a means of ascertaining whether an agency or instrumentality "represents" the Crown for the purpose of determining whether that agency or instrumentality is bound by a statute enacted by the legislature. The doctrine is in essence an aid to the process of statutory interpretation whereby the Courts seek to ascertain the legislative intent of Parliament. Hence it has been said that an agency or instrumentality may be endowed with the attributes of the Crown for one purpose but not for other. Indeed, the legislature could explicitly endow a private corporation carrying on business for private purposes with the privileges and immunities of the Crown, yet that private corporation would not answer the description of "a State" for constitutional purposes. The question which arises here is not to be answered by reference to a doctrine which has evolved with the object of answering questions of a different kind. The question here "depends upon the meaning and operation of an unalterable constitutional provision which the intention of the legislature cannot affect (*Bank of N.S.W. v. The Commonwealth* [1948] 76 CLR, per Dixon J at p. 359).

Once it is accepted that the Constitution refers to the Commonwealth and the States as organizations or institutions of government in accordance with the conceptions of ordinary life, it must follow that these references are wide enough to denote a corporation which is an agency or instrumentality of the Commonwealth or a State as the case may be. The activities of the government are carried on not only through the departments of government but also through corporations which are agencies or instrumentalities of government. Such activities have, since the nineteenth century, included the supply on commercial terms of certain types of goods and services by government owned and controlled instrumentalities with independent corporate personalities. Railways are a notable example. As early as 1906, in *The Federated Amalgamated Government Railway and Tramway Service Association v. The New South Wales Railway Traffic Employees Association ("the Railway Servants Case")* ([1906] 4 CLR 488), this Court recognized that the railway undertakings of the colonial governments carried on by incorporated Railway Commissioners were instrumentalities of those governments (*ibid*, per Griffith CJ at p. 535). Likewise, banking activities were conducted by corporations under legislation enacted by the colinial legislatures before federation and the Constitution expressly exempted "State banking" (that is, "banks established and conducted by a State or by an authority established under State law and representing a State": *Melbourne Corpn. v. The Commonwealth* [1947] 74 CLR 31, per Latham CJ at p. 52) from the reach of the legislative power with respect to banking conferred by s. 51(xiii).

The plaintiff submits that nonetheless the carrying on of ordinary banking business is not a function of the executive government of either the Commonwealth or a State. In this respect the plaintiff points to the comments of Griffith CJ in *Heiner v. Scott* ([1914] 19 CLR 381, at p. 392). There, his Honour, with reference to the provisions of the *Commonwealth Bank Act* 1911 (Cth) which set up that bank as a body corporate, observed:

> It may be conceded that the Commonwealth Parliament may for the more convenient exercise of any of the executive functions of government set up a corporation for the purposes of acting as an agent or instrumentality of government.

However, his Honour went on to say (*ibid*., at p. 393):

> In my opinion the carrying on of ordinary banking business is not a function of the executive Government of the Commonwealth conferred by the Constitution.

The other Justices did not express an opinion upon this point. The Chief Justice's view obviously reflects the distinction, then current, between traditional and inalienable functions of government on the one hand and business, commercial and trading functions undertaken by government on the other hand. That distinction has since been discarded. And it can have no place in the interpretation of s. 114, which must take account of the historical circumstance that colonial governments in Australia carried on a wide range of governmental functions which were not traditional and inalienable (See generally Finn, *Law and Government in Colonial Australia*, (1987)). As has been said, those functions included government banking. Indeed, at the time of federation, it had long been recognized that a bank was "a convenient, a useful, and essential instrument in the prosecution of [a government's] fiscal operations" (*McCulloch v. Maryland* [1819] 17 US 316, at p. 422; and see *Melbourne Corpn. v. The Commonwealth* [1947] 74 CLR, at p. 52).

Subsequent decisions of this Court establish not only that the Parliament may set up a corporation to carry out any of the executive functions of government on the footing that it is an agency or instrumentality of government but also that the Commonwealth Trading Bank is the Commonwealth notwithstanding that it is a body corporate. To the extent that the course of decisions turns on the provisions of s. 75(iii) of the Constitution, there is the complication arising from the reference in that provision to "or a person suing or being sued on behalf of the Commonwealth". No doubt these words were included in order to ensure that the jurisdiction conferred extended to cases in which the Commonwealth itself was not the nominal plaintiff or defendant. But that circumstance cannot operate as a reason for reading the references to the Commonwealth in the Constitution in a restricted sense. Still less can it operate as a reason for reading the references to "a State" in that way.

In *Inglis v. Commonwealth Trading Bank of Australia* ([1969] 119 CLR 334) there was a difference of opinion on the question whether the Commonwealth Trading Bank was "the Commonwealth" or "a person ... being sued on behalf of the Commonwealth" within the meaning of s. 75(iii) (See the discussion by Gibbs CJ in *Crouch v. Commissioner for Railways (Q.)* [1985] 159 CLR, at pp. 30-31). However, later, in *Maguire v. Simpson* ([1977] 139 CLR 362), the Court decided that the Trading Bank was "the Commonwealth" for the purposes of s. 64 of the Judiciary Act. That decision established that, in an appropriate context, the words "the Commonwealth" are wide enough to include a corporation which is an agency or instrumentality of the Commonwealth. By a like process of reasoning, the words "a State" have a similarly wide meaning. And in *Crouch*, this Court held unanimously that the Commissioner for Railways was an instrumentality of the state of Qeensland for the purposes of the s. 75(iv) of the Commissioner was an instrumentality "through which the executive government of the State discharges an important part of its governmental functions", the conduct of railways being, as a matter of history, a "very large and important part" of government in this country, a fact recognized in the Constitution itself ([1985] 159 CLR, per Mason, Wilson, Brennan, Deane and Dawson JJ at p. 38).

Both s. 98 and s. 102 of the Constitution recognize that the State railways are property of the States, s. 98 explicitly so. The recognition is significant for the purposes of this case because, at the time of federation as now, State railways were carried on by authorities on behalf of the States.

There is no reason for drawing a distinction between the reference to "a State" in s. 75(iv) and similar references elsewhere in the Constitution where the reference is to a State as a polity and not as a geographical area (*Crouch, ibid.*, per Gibbs CJ at p. 32). Indeed, the

decision in *The Municipal Council of Sydney v. The Commonwealth* is direct authority for the proposition that a corporation exercising governmental functions is "a State" for the purposes of s. 114. In that case the municipal council, a body corporate, which levied local government rates on property, was held to be the State and its rates were held to be a tax on property for the purposes of that section.

The question then is whether the State Bank is discharging governmental functions for the State or, to put it another way, is the State carrying on banking through its statutory corporation, the State Bank. The unanimous decision in *State Bank of N.S.W. v. Commonwealth Savings Bank of Australia* ([1986] 161 CLR 639) is decisive of that question. There the Court held that an action by the State Bank was a suit by "a State" for the purposes of s. 38(d) of the Judiciary Act. In the course of reasoning to that conclusion, the Court, after considering in detail the relevant provisions of the State Bank Act, which have not been amended in any substantial respect, held that "the State carries on banking through its statutory corporation, the bank, and that it necessarily follows that the bank is for this purpose the State of New South Wales" (*ibid*., at p. 652).

In the result we would overrule the plaintiff's demurrer, give judgment in the demurrer for the defendant with costs and give judgment for the defendant in the action with costs.

Also found at [1992] 3 CLJ 1659